IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO. 262 OF 2007

IN

SUIT NO. 296 OF 1979

Smt.Shantibai K. Vardhan & Ors. ...Plaintiffs.

V/s.

Meera G.Patel & Anr. ...Defendants.

Mr.Nitin Thakkar, Senior Advocate a/w. Mr.S.R.Kothari i/b.M/s. Vigil Jons for the plaintiffs.

Mr. Chirag Balsara a/w. Mr. Dilip Taur i/b. M/s.K.Ashar & Co. for defendant Nos. 1 to 5.

CORAM : ANOOP V. MOHTA,J.

DATED : 16th June, 2007

P.C.

1. The plaintiff has taken out this Chamber Summons to amend the plaint, in view of the point raised at the time of hearing of the suit, which goes to the root of the main suit as it covers and includes the issue about the maintainability of the suit itself.

2. Admittedly, in the written statement in para two, defendant no.1 has raised the issue about maintainability of the suit. This court after hearing both the parties by order dated 28th August, 2003 has framed the issues. No such issue about the

maintainability was framed.

3. As the controversy arose about the maintainability of the suit at the time of hearing of the suit, the plaintiff therefore has filed this Chamber Summons, as according to them, it is necessary to amend the plaint to settle the controversy between the parties.

4. The learned counsel for defendant nos. 1 to 5 is resisted the same. The submission is based on the proviso to order VI, Rule 17 of C.P.C. The submission is also that all these points were available earlier. Therefore, it is not open for the plaintiff now to seek such amendment as it halt the trial itself.

5. Having once raised the issue in paragraph two about the maintainability of the suit, defendant no.1 did not press the said issue at the time of framing of the issues as recorded. The plaintiffs on the issues available led evidence accordingly. Now during the course of hearing, if such issue arises and as it goes to the root of the matter. I am of the view that the plaintiffs need to be given full opportunity to lead the case now raised, even at this stage of the proceeding and especially when it goes to the root of

the matter. The learned senior counsel appearing for the plaintiff has strongly relied on **AIR 1993 Karnatak 257,** B.R.Mulani, Appellant v. Dr. A.B.Aswathanarayana and others, wherein the Karnataka Division Bench has observed that Whenever a party raises a plea and does not have the issue raised in regard and goes to trial and have the matter decided without having an issue raised on the plea, the party must be deemed to have given up such a plea.

6. However, in the present case though such preliminary issue was not framed during the course of hearing this point arose. In this background I am of the view that in the interest of justice it is necessary to grant this Chamber Summons as prayed. The Defendants are at liberty to raise all the pleas available in view of the amendment to the plaint itself. The parties are at liberty to lead evidence if advised and necessary, on the basis of pleas raised in the amended plaint, as well as, in the amended written statement if any.

7. The Chamber Summons is accordingly allowed of in terms of prayer (a). The amendment to be carried out within two weeks. The amended written statement be filed within four weeks. The parties to file

affidavit of evidence and documents within two weeks thereafter.

8. By consent, Commissioner i.e. Mr. Firoz Kolabawala is appointed to take additional evidence if necessary.

9. The parties to bear expenses of the Commissioners equally. The Commissioner’s charges and expenses which includes past balance payments if any.

10. Adjourned for eight weeks.

[ANOOP V. MOHTA, J.]